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IN THE

# Supreme Court of the United States

GARY GIBSON, Warden,

*Petitioner*,

*vs.*

MARK DAVID JOHNSON,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does *Simmons* v. *South Carolina*, 512 U. S. 154 (1994) apply to a system where the sentencer has a three-way discretionary choice between life, life without parole, and death?

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case raises key issues concerning federalization of questions of law that are traditionally within the purview of the states. The Court of Appeals has given an expansive

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Counsel for both parties have consented to the filing of this brief.

reading to the due process protections that are available in a limited number of capital cases, as first set forth in *Simmons* v. *South Carolina*. This expansion of *Simmons* to triple sentencing systems threatens to open up federal constitutional challenges on federal habeas as well as on direct review. The Court of Appeals has made this decision in direct conflict with decisions in the states of Illinois and Georgia that apply the *Simmons* rule in accordance with the decisions of this Court. The Tenth Circuit's expansion of *Simmons* exposes jury instructions, throughout the states, to a needless layer of review. The resulting delay and expense would be contrary to the rights of victims and society which CJLF was formed to serve.

## SUMMARY OF FACTS AND CASE

On July 24, 1991, defendant Mark Johnson beat 33-year-old Billy Webb with a baseball bat while co-defendant Rickey Masquat poured gasoline on Webb and set him afire. *Johnson* v. *Gibson*, 254 F. 3d 1155, 1158 (CA10 2001). Billy suffered a head wound and second- and third-degree burns over 95 percent of his body. *Ibid.* He lived approximately 17 hours after being beaten and burned. He remained alert and coherent, rejecting sedatives in the hopes that he would be able to talk to his mother before he died. During this period, he was able to describe Johnson and Masquat as his attackers. *Ibid.*

Johnson was convicted of murder. *Id.*, at 1159. "The trial court instructed the jury to consider its sentencing options of death, life imprisonment, and life imprisonment without the possibility of parole. During its deliberations, the jury inquired 'We need to know! Is life without parole firm — Does it mean he can *never* be paroled?' [Citation.] The trial court informed the jury that 'it is inappropriate for you to consider the question asked.' " *Id.*, at 1164 (emphasis in original). The jury found the existence of two aggravating circumstances and sentenced the defendant to death. The Oklahoma Criminal Court of Appeals affirmed the judgment and sentence. The court held

that the judge's response was a misstatement of state law but harmless. *Johnson* v. *State*, 928 P. 2d 309, 320 (1996). The defendant filed a habeas petition in the United States District Court for the Eastern District of Oklahoma. The District Court noted that, though the trial court response constitutes state law error, it was not of constitutional magnitude; therefore, the defendant was not entitled to relief. See J. A. 69. The Court of Appeals for the Tenth Circuit applied *Simmons* v. *South Carolina*, 512 U. S. 154 (1994) to Oklahoma's triple sentencing system, concluded that the trial court's response was a violation of the defendant's Fourteenth Amendment due process rights, and further held that it was not harmless beyond a reasonable doubt. 254 F. 3d, at 1166-1167.

## SUMMARY OF ARGUMENT

The present case has confused the standards for implementation of the due process protection provided to defendants in a limited number of capital cases as set forth in *Simmons* v. *South Carolina* and its progeny. Specifically, when the State injects the defendant's future dangerousness into the case, the defendant is statutorily ineligible for parole, and the only available alternative sentence to death is life without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury of his parole ineligibility.

The Tenth Circuit's decisions on this issue are in conflict with decisions by both the Illinois Supreme Court and the Georgia Supreme Court. The Tenth Circuit's application of *Simmons* to Oklahoma's triple sentencing system extends federal constitutional review to matters of state law.

## ARGUMENT

### The Tenth Circuit's decision conflicts with the decisions of the highest courts of other states that *Simmons* is inapplicable to triple or multiple sentencing schemes.

*A. The Simmons Rule.*

The Petition for Writ of Certiorari in this case fully discusses the conflict between the Tenth Circuit's application of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), to Oklahoma's triple sentencing structure in capital cases and the Oklahoma Court of Criminal Appeals' position that *Simmons* should not be extended beyond the scope of its holding. This brief will discuss the split of authority between other states' treatment of *Simmons* and the Tenth Circuit's departure from its principles.

The narrow rule of *Simmons* that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." *Id.*, at 178 (O'Connor, J., concurring in the judgment). In subsequent cases, this Court has confirmed that *Simmons* affords a right of rebuttal that is activated only in a limited number of capital cases. *O'Dell* v. *Netherland*, 521 U. S. 151, 167 (1997). Conclusive proof of the defendant's parole ineligibility, under state law, is a prerequisite to imposition of the *Simmons* rule upon the sentencing court. See *Ramdass* v. *Angelone*, 530 U. S. 156, 166 (2000) (plurality opinion). In *Ramdass*, this Court distinguished between the circumstance where a defendant's parole ineligibility is a foregone conclusion, as in *Simmons* where the defendant was statutorily prohibited from parole, and the circumstance in which his parole status is yet to be determined.

*Shafer* v. *South Carolina*, 532 U. S. 36, 149 L. Ed. 2d 178, 121 S. Ct. 1263 (2001) found *Simmons* applicable to the two-way choice provided to jurors during that portion of their

deliberations where they have discretion to choose between a sentence of death or life without parole. *Shafer* made clear that none of *Simmons* due process concerns arise during the jury's initial "tightly circumscribed factual inquiry," to determine the existence of any aggravating circumstances. *Id.*, 149 L. Ed. 2d, at 191, 121 S. Ct., at 1261. The *Shafer* Court pointed out that South Carolina jurors must reach a unanimous decision that aggravating (*i.e.*, death-eligibility) circumstances exist in order to proceed to the actual sentencing of the defendant. After this occurs, *only two sentences* are legally available under South Carolina law: death or life without the possibility of parole. *Id.*, at 191, 121 S. Ct., at 1272. At present, that is the limit of *Simmons*' scope.

*Simmons* created a specific exception to the general deference accorded to state sentencing proceedings. See *California* v. *Ramos*, 463 U. S. 992, 1000 (1983). For the first time, States were required to inform juries of a defendant's statutory parole ineligibility. See *O'Dell*, 521 U. S., at 164-165.

In effect, *Simmons* and its progeny have set out a straightforward prophylactic rule that protects defendants in capital cases against prosecutorial arguments about the defendant's future dangerousness to society that could mislead jurors into believing that if a sentence of death is not imposed, the defendant will eventually be released from prison and again threaten society, when in fact the only available sentencing alternative is life imprisonment without possibility of parole. Informing the jury when a prohibition against parole exists insures that the defendant is given the opportunity to explain or deny evidence or arguments that indicate he would pose a continuing threat to society, consistently with the principle of *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977).

In its application of the *Simmons* exception to Oklahoma's triple-sentencing structure, the Tenth Circuit is in direct conflict with the treatment of *Simmons* in other states with triple or multiple sentencing schemes. The resulting split of authority is

bound to create uncertainty as to what penalty phase circumstances will trigger *Simmons*.

*B. Illinois.*

The Illinois Supreme Court has repeatedly declined to extend *Simmons* to its multiple choice sentencing structure. In Illinois, if the jury finds unanimously that one or more aggravating factors outweigh any mitigating factors, then the court shall impose the death sentence. Ill. Comp. Stat., ch. 720, § 5/9-1(g) (2001 Supp.). If the jury does not make this finding, imposition of sentence becomes the court's responsibility, and the court chooses from a range of statutorily permissible sentences, including life without possibility of parole ("natural life") and life with the possibility of parole. Ch. 730, § 5/5-8-1. In other words, where the defendant does not receive a sentence of death, then in most cases he is statutorily eligible for a sentence of life with the possibility of parole. At this juncture, the trial court could impose any sentence within the permissible statutory range. For purposes of the present question, Illinois' capital sentencing structure is equivalent to Oklahoma's, in that, once the initial fact-finding inquiry as to the existence of any aggravating circumstances is concluded, the sentencing phase encompasses three alternatives: death, life imprisonment without the possibility of parole, and life with the possibility of parole. The allocation of decisions between the judge and jury is different, but that allocation does not affect the present question.

In Illinois, a *Simmons* issue does arise if the defendant is convicted of multiple murders, because in such a case he is subject to the Illinois' statutory prohibition against parole. In such cases, the Illinois Supreme Court has held that a *Simmons*-type instruction should be given. See *People* v. *Macri*, 705 N. E. 2d 772, 806 (Ill. 1998); *People* v. *Terrell*, 708 N. E. 2d 309, 333 (Ill. 1998); *People* v. *Simpson*, 665 N. E. 2d 1228, 1245 (Ill. 1996). Thus, *Simmons* applies, and the Illinois courts administer a *Simmons* instruction in multiple murder cases.

where the defendant is statutorily ineligible for parole in the event a death sentence is not imposed.

However, when the discretionary stage has been reached and the sentencing options include something other than death or life without parole, *Simmons* is not triggered. Accordingly, the Illinois Supreme Court does not apply *Simmons* to its triple sentencing scheme in single-murder cases.

*People* v. *Simpson*, *supra*, held that the fact the trial court did not, *sua sponte*, instruct the jury on the alternate sentences the defendant could serve if he did not receive the death penalty was not a *Simmons* violation. 665 N. E. 2d, at 1245. The trial judge had refused to define for the jury the term "life imprisonment" so that the jury would understand that it did not include the possibility of parole. During deliberations, the judge also refused to answer the jury's question as to whether a life sentence included the possibility of parole. *Ibid.* The Illinois Supreme Court held that "defendant is not entitled to have the jury informed that if defendant is not sentenced to death, he is eligible for a range of possible alternate sentences, including natural life imprisonment." *Ibid.*; see also *People* v. *Simms*, 572 N. E. 2d 947, 958 (Ill. 1991). The court noted it had previously declined to extend this rule in earlier cases. See *People* v. *Williams*, 641 N. E. 2d 296, 326 (Ill. 1994); *People* v. *Bean*, 560 N. E. 2d 258, 281-282 (Ill. 1990).

*Macri*, 705 N. E. 2d, at 807, and *Terrell*, 708 N. E. 2d, at 333 both involved arguments by the defendants that a *Simmons* due process violation occurred when the trial judge refused to inform the sentencing jury that one of the sentences available was life imprisonment without possibility of parole. The Court reconfirmed its holding in *Simpson* and held that *Simmons* " 'addresses those situations where state law mandates that if the defendant is not sentenced to death, the only alternate sentence is natural life imprisonment.' " *Macri*, *supra*, at 807 (quoting *Simpson*, *supra*, at 1245).

*C. Georgia.*

Likewise, the Georgia Supreme Court has held that a trial court's refusal to instruct a jury on the meaning of a life sentence is not erroneous because Georgia juries are instructed as to the state's statutory provisions defining life imprisonment and life imprisonment without parole. *Philpot* v. *State*, 486 S. E. 2d 158, 160 (1997). Under Georgia's capital sentencing structure, upon a unanimous finding of at least one aggravating circumstance, the jury recommends that the court impose either death, life, or life without parole. If the jury cannot reach a unanimous finding as to any aggravating circumstances, then the court imposes a sentence of life or life without parole. Ga. Code Ann. § 17-10-31.1. Akin to Illinois and Oklahoma, Georgia's sentencing structure provides three choices at the sentencing phase.

On occasion, the Georgia Supreme Court has been asked to require that a *Simmons* instruction be given to defendants under its three-way system. In *Burgess* v. *State*, 450 S. E. 2d 680, 693 (Ga. 1994), the defendant cited *Simmons* as requiring the trial court to instruct the jury as to parole eligibility. The Georgia Supreme Court reiterated its position that *Simmons* "only stands for the relatively narrow proposition that, where the State makes an issue of the defendant's future dangerousness during the sentencing phase of a capital trial and state law *prohibits* the defendant's release on parole, the jury must be informed that the defendant is ineligible for parole." *Id.*, at 693 (emphasis in original). Since Georgia state law did not prohibit Burgess's release on parole, *Simmons* was not applicable. *Id.*, at 693-694.

In *Philpot*, *supra*, the defendant argued that *Simmons* required that he be allowed to admit evidence and to have the jury instructed about the specific minimum time under statute he would be required to serve before he could become eligible for parole. 486 S. E. 2d, at 160. The court held that "*Simmons* is not applicable to this case" and declined to "expand the holding in *Simmons* so as to require reversal of the trial court's

rulings on evidence and jury instructions regarding the specifics of Philpot's parole eligibility." *Id.*, at 171.

Illinois and Georgia provide three options during the capital sentencing phase; both states have held that *Simmons* is confined to situations where the sentencing phase choices are limited to death or life without parole. The Tenth Circuit's holdings in *Mayes* v. *Gibson*, 210 F. 3d 1284, 1294 (2000), *McGregor* v. *Gibson*, 219 F. 3d 1245, 1256 (2000), and *Johnson* v. *Gibson*, 254 F. 3d 1155, 1165-1166 (2001) that Oklahoma's similar, three-way choice "fulfills *Simmons*" is different from, and in conflict with, the state-court holdings that *Simmons* is simply inapplicable.

Whether sentencing discretion resides with the jury or the judge is irrelevant to a *Simmons* analysis. The critical threshold question is whether the discretionary sentencing decision is limited to choice of death or life without parole, rather than who holds the sentencing responsibility. If the only options are death or life without possibility of parole and the State injects future dangerousness as a basis for a sentence of death, then the states are constitutionally required, under the Due Process Clause of the Fourteenth Amendment, to inform juries as to the defendant's parole ineligibility. Where the alternatives available to the sentencer include a sentence with the possibility of release, no *Simmons* issue arises.

The Tenth Circuit's expansion of *Simmons* to three-choice sentencing systems threatens to open up yet another fertile field of federal constitutional challenges to matters that have always been questions of state law. If *Simmons* applies, then the jury instructions will have to be parsed and second-guessed on federal habeas as well as on direct review.

We have far too much of this already. The last thing our judicial system needs is for the "annually improvised Eighth Amendment 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), to suddenly sprout yet another new branch and subject yet another

aspect of state trials to federal scrutiny. See *Shafer*, 149 L. Ed. 2d, at 196, 121 S. Ct., at 1276 (Thomas, J., dissenting).

A "United States court of appeals . . . has decided an important federal question in a way that conflicts with [ ] decision[s] by [multiple] state court[s] of last resort . . . ." See Supreme Court Rule 10(a).

## CONCLUSION

The petition for writ of certiorari should be granted.

September, 2001

Respectfully submitted,

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